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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91181448
Party	Defendant Patriot Guard Riders, Inc.
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Submission	Motion to Strike
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Date	04/25/2011
Attachments	Applicant's Motion to Strike and Memorandum in Support Thereof.pdf (10 pages) (818777 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

JEFF BROWN,)	
)	
Opposer,)	
)	Opposition No. 91181448
PATRIOT GUARD RIDERS, INC.,)	
)	
Applicant.)	

**APPLICANT'S MOTION TO STRIKE
PORTIONS OF OPPOSER'S NOTICE OF RELIANCE**

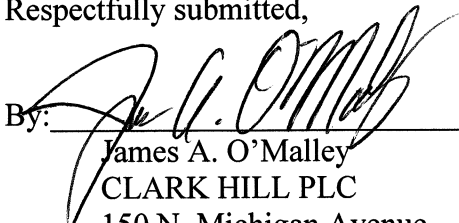
Applicant, Patriot Guard Riders, Inc., by and through its counsel, hereby moves to strike portions of Opposer's Notice of Reliance.

As discussed in further detail in "*Applicant's Memorandum in Support of its Motion to Strike Portions of Opposer's Notice of Reliance*," which has been filed herewith, Applicant respectfully requests the Board to:

1. Strike the File Wrapper for United States Trademark Application Serial No. 77383586, identified in Paragraph 1 of Opposer's Notice of Reliance, from the record;
2. Strike the Internet Printouts, identified in Paragraph 5 of Opposer's Notice of Reliance, from the record; and
3. Instruct Opposer to limit the issues raised in his main brief to those specific issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition.

Date: April 25, 2011

Respectfully submitted,

By: 
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

JEFF BROWN,)	
)	
Opposer,)	
)	Opposition No. 91181448
PATRIOT GUARD RIDERS, INC.,)	
)	
Applicant.)	

**APPLICANT’S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE
PORTIONS OF OPPOSER’S NOTICE OF RELIANCE**

Applicant, Patriot Guard Riders, Inc. (“PGR”), by and through its counsel, has moved to strike portions of the Notice of Reliance filed by Opposer, Jeff Brown (“Brown”).

INTRODUCTION

On April 19, 2011, Brown served his Notice of Reliance on PGR. The next day, April 20, 2011, Brown electronically filed his Notice of Reliance with the Trademark Trial and Appeal Board. *See Dkt. #46.*

Brown’s Notice of Reliance states, in pertinent part:

1. File Wrapper for United States Trademark Application Serial No. 77383586 for PATRIOT GUARD RIDERS filed on January 29, 2008. The application history will be relied upon to show material changes in the use of the mark shown in United States Trademark Application Serial No. 770400379 [sic] by PGR, Inc. and to corroborate testimony of witnesses as to PGR, Inc.’s use of a mark confusingly similar to that of the opposer.

...

5. The home page, the PGR Gear Store home page, the PGR terms of use, the PGR history page, and PGR archived home pages printed from the publicly accessible portions of the PGR website, www.patriotguard.org, on April 18, 2011, relied upon to show PGR’s efforts or lack thereof in policing use of the mark and in denying Opposer access to the organization insofar as such denial gives rise to excusable non-use.

PROCEDURAL BACKGROUND

On July 21, 2009, the Trademark Trial and Appeal Board denied the Parties' cross-motions for summary judgment on the grounds of likelihood of confusion and fraud, and further noted that Brown's original Notice of Opposition was deficient with regard to the likelihood of confusion claim. The Board allowed Brown the opportunity to file and serve an amended Notice of Opposition to sufficiently allege likelihood of confusion, ownership of his United States Trademark Application Serial No. 77041061 (hereinafter "Brown's Word Mark Application"), and priority and ownership of the mark in PGR's United States Trademark Application Serial No. 77040379 (hereinafter "PGR's Logo Mark Application"). *See Dkt. #24.*

On August 4, 2009, Brown filed his Amended Notice of Opposition. *See Dkt. #25.* Soon thereafter, on August 18, 2009, PGR filed a Motion to Strike the following from Brown's Amended Notice of Opposition: (1) newly alleged fraud grounds; (2) allegations relating to specimens submitted during the prosecution of PGR's Logo Mark Application; and (3) references relating to PGR's United States Trademark Application No. 77383586 (hereinafter "PGR's Word Mark Application"). *See Dkt. #26.*

In the Board's Order dated March 1, 2010 (*see Dkt. #31*), the Board explained that:

(1) Brown's allegations relating to additional bases of fraud were improper and, therefore, the Board struck all allegations relating thereto;

(2) Brown's allegations relating to the adequacy of the specimens filed by PGR during the prosecution of PGR's Logo Mark Application were improper and, therefore, the Board struck all allegations relating thereto; and

(3) Brown's raising issues or references that relate to PGR's Word Mark Application were improper and, therefore, the Board struck any issues and references relating to PGR's Word Mark Application.

Brown thereafter submitted a "clean copy" of his Amended Notice of Opposition on March 11, 2010 in which Brown acknowledged the Board's Order dated March 1, 2010 and which set forth "the claims of priority and likelihood of confusion from his amended notice of opposition and the claims of fraud from his original notice of opposition, and further strikes any issues or references relating to Application No. 77383586 [PGR's Word Mark Application] as ordered." *See Dkt. #32.*

ARGUMENT

I. The File Wrapper for PGR's Word Mark Application Identified in Paragraph 1 of Brown's Notice of Reliance Should Be Stricken From the Record

In Paragraph 1 of his Notice of Reliance, Brown indicates that he is planning on relying on the File Wrapper for PGR's Word Mark Application.

A. Brown's Intended Reliance on the File Wrapper is Contrary to the Board's Order Dated March 1, 2010

The Board's March 1, 2010 Order clearly states that, "[i]nasmuch as application Serial No. 77383586 [PGR's Word Mark Application] is currently in examination and has not been published for opposition, any attempt to assert likelihood of confusion or fraud with respect to this application is premature. In view thereof, applicant's motion to strike any issues and references relating to application Serial No. 77383586 in the amended notice of opposition is granted." *See Dkt. #31.*

Thus, Brown should not be entitled to rely on the file wrapper for PGR's Word Mark Application for any purpose in connection with this Opposition proceeding. Thus, PGR

respectfully requests that the Board strike the File Wrapper for PGR's Word Mark Application from the record.

B. Brown's Intended Reliance on the File Wrapper to Show Alleged Material Changes in the Use of the Mark Shown in PGR's Logo Mark Application is Improper

Brown has stated that he intends to rely on the file wrapper to show alleged material changes in PGR's use of the mark shown in PGR's Logo Mark Application.

Any allegations regarding material changes in PGR's use of the mark are irrelevant to the issues raised by Brown in the "clean copy" of his Amended Notice of Opposition, namely ownership of Brown's Word Mark Application, priority and ownership of the mark in Brown's Word Mark Application, likelihood of confusion between Brown's use of the mark in Brown's Word Mark Application and PGR's use of the mark in PGR's Logo Mark Application, and whether PGR's actions at the time of filing PGR's Logo Mark Application constituted fraud.

Thus, Brown's intended use of the file wrapper, especially to the extent that Brown is intending to allege that PGR has abandoned its use of the mark shown in PGR's Logo Mark Application, is improper for the same reasons raised in PGR's Motion to Strike filed on August 18, 2009 and upheld in the Board's March 1, 2010 Order. Therefore, PGR respectfully requests that the Board strike the File Wrapper for PGR's Word Mark Application from the record and, furthermore, that the Board instruct Brown to limit the issues raised in his main brief to those specific issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition.

C. Brown's Intended Reliance on the File Wrapper to Corroborate Testimony of Witnesses as to PGR's Use of a Mark Confusingly Similar to that of Brown is Improper

Brown has stated that he intends to rely on the file wrapper to corroborate testimony of witnesses as to PGR's use of a mark that is confusingly similar to that of Brown.

Any allegations regarding likelihood of confusion are properly limited to being between Brown's use of the mark in Brown's Word Mark Application and PGR's use of the mark in PGR's Logo Mark Application. Thus, PGR's use of the mark in PGR's Word Mark Application is irrelevant to this proceeding and, furthermore, as stated by the Board in its March 1, 2010 Order, is premature. *See Dkt. #31.*

Thus, Brown's intended use of the file wrapper is improper for the same reasons raised in PGR's Motion to Strike filed on August 18, 2009 and upheld in the Board's March 1, 2010 Order. Therefore, PGR respectfully requests that the Board strike the File Wrapper for PGR's Word Mark Application from the record and, furthermore, that the Board instruct Brown to limit the issues raised in his main brief to those specific issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition.

II. The Internet Printouts Identified in Paragraph 5 of Brown's Notice of Reliance Should Be Stricken From the Record

In Paragraph 5 of his Notice of Reliance, Brown indicates that he is planning on relying on Internet printouts of the home page, the PGR Gear Store, the PGR terms of use, the PGR history page, and PGR archived home pages printed from PGR's website www.patriotguard.org.

A. Internet Printouts Cannot Be Submitted Under a Notice of Reliance

The Board has repeatedly held that Internet web pages do *not* constitute "printed publications" within the meaning of Trademark Rule 2.122(e). Unlike articles obtained from an electronic database such as that of LexisNexis, Internet printouts cannot be submitted under a

Notice of Reliance. *See Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1956 (TTAB 2008); *see also Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998). Brown had the opportunity to make these or similar Internet printouts of record during his testimony period through the testimony deposition of a knowledgeable witness, but failed to do so.

Thus, because the last forty-nine (49) pages of Brown's Notice of Reliance submission constitute Internet printouts, which were not properly made of record during Brown's testimony period, PGR objects to Brown's inclusion of these documents in his Notice of Reliance.

Therefore, PGR respectfully moves the Board to strike these Internet printouts from the record.

B. Brown's Intended Reliance on the Internet Printouts to Show PGR's Efforts or Alleged Lack Thereof in Policing Use of the Mark and in Denying Brown Access to the Organization Insofar as such Denial Gives Rise to Excusable Non-Use is Improper

Brown has stated that he intends to rely on the Internet printouts to show PGR's efforts or alleged lack thereof in policing use of the mark and in denying Brown access to the organization insofar as such denial gives rise to excusable non-use.

Any allegations regarding PGR's policing of the mark in PGR's Logo Mark Application or regarding excusable non-use of the mark in PGR's Logo Mark Application by PGR are irrelevant to the issues raised by Brown in the "clean copy" of his Amended Notice of Opposition, namely ownership of Brown's Word Mark Application, priority and ownership of the mark in Brown's Word Mark Application, likelihood of confusion between Brown's use of the mark in Brown's Word Mark Application and PGR's use of the mark in PGR's Logo Mark Application, and whether PGR committed fraud in the filing of PGR's Logo Mark Application.

Thus, Brown's intended use of the Internet printouts, especially to the extent that Brown is intending to allege that PGR has abandoned its use of the mark shown in PGR's Logo Mark Application, is improper for the same reasons raised in PGR's Motion to Strike filed on August

18, 2009 and upheld in the Board's March 1, 2010 Order. Therefore, PGR respectfully requests that the Board strike the Internet printouts from the record and, furthermore, that the Board instruct Brown to limit the issues raised in his main brief to those specific issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition.

CONCLUSION

For the foregoing reasons, PGR respectfully requests the Board to:

1. Strike the File Wrapper for PGR's Word Mark Application, identified in Paragraph 1 of Brown's Notice of Reliance, from the record;
2. Strike the Internet Printouts, identified in Paragraph 5 of Brown's Notice of Reliance, from the record; and
3. Instruct Brown to limit the issues raised in his main brief to those specific issues that have been properly pleaded by Brown in the "clean copy" of his Amended Notice of Opposition.

Respectfully submitted,

Date: April 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2011, true and correct copies of the “*Applicant’s Motion to Strike Portions of Opposer’s Notice of Reliance*” and “*Applicant’s Memorandum in Support of its Motion to Strike Portions of Opposer’s Notice of Reliance*” were sent by first class mail, postage prepaid, and by e-mail, to:

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